ICC COMPENDIUM OF ANTITRUST DAMAGES ACTIONS

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Introduction

This chapter is part of the *ICC Compendium of Antitrust Damages Actions* (the “Compendium”) which can be read in full on the ICC website at www.iccwbo.org.

Designed to provide decision-makers with a comparative overview of the issues most frequently arising in private antitrust litigation in key jurisdictions, the Compendium reflects contributions from leading antitrust law specialists around the world. It does not try to explore the complexity of each legal system but strives to capture a comprehensive picture of the matter, organised around nine topics, and completed in some jurisdictions by an additional chapter highlighting key issues. A collection of decisions issued in the same jurisdictions is also available on the ICC website. This database is the essential complement to the overviews for a comparative approach and will allow a better understanding of the rules presented in the compendium.

With this publication, ICC hopes to help in-house counsels, antitrust practitioners and enforcers, but also judges of the courts and academics, navigate through a new, fast-changing legal environment.
**Glossary**

**Appeal:** a proceeding undertaken to have a decision reviewed by a higher authority whose jurisdiction may include (i) an entirely new assessment of the case, (ii) a limited review of manifest errors of law and facts, or (iii) a specific review limited to legal issues.

**Article 101 TFEU:** This provision prohibits as anti-competitive all agreements, decisions, and practices between undertakings and concerted practices which may affect trade between EU Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market.

**Article 102 TFEU:** This provision prohibits any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it. Those behaviours are incompatible within the internal market in so far as it may affect trade between EU Member States.

**Award:** a final judgment or decision, especially one by an arbitrator or by a jury assessing damages.

**Burden of proof:** The responsibility for a party during legal proceedings to prove the facts it asserts; the burden of proof may be shifted to the opposing party once the standard of proof has been met.

**Cartel:** Any horizontal collusion between competitors whose purpose is to fix prices or quantities, allocate markets, while sharing sensitive commercial information.

**Cease-and-desist order:** a court’s or agency’s order prohibiting a person from continuing a particular course of conduct which is deemed harmful. In competition law proceedings, these orders also include a prohibition from adopting future conducts likely to have the same effects as the one which is prohibited.

**Claimant:** the party who brings a civil suit in a court of law.

**Class action:** a lawsuit where a person or a group seeks damages for a larger group of claimants. Class action proceedings typically include a preliminary stage to define the characteristics of the group, which needs to gather persons with identical cases and who have suffered a prejudice from the same tort.

**Competition authority:** Any public authority, whether independent of forming part of a government administration, whose role is to enforce rules which prohibit unilateral and coordinated behaviours that restrict competition.

**Damages:** money claimed by, or ordered to be paid to, a person as compensation for loss or injury.

**Defendant:** a person sued in a civil proceeding.

**Discovery:** Proceeding whereby a party has to disclose information and documents relating to the litigation upon the request of the opposing party. This procedure is usually implemented during the pre-trial phase of the lawsuit.
**Directive 2014/104/EU:** European Union Directive issued on 5 December 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and the EU. The purpose of this text is to set forth common rules among EU Member States in order to enhance private enforcement of Articles 101 and 102 TFEU and full compensation for victims of anti-competitive conducts. The text also provides for specific rules on the interplay between civil lawsuits and enforcement proceedings before competition authorities.

**Follow-on:** A competition law claim for damages where the alleged infringement has previously been found by a final decision of a competition authority.

**Immunity:** Total exemption of fine for a company that is the first to reveal the existence of a competition law infringement to a competition authority.

**Infringer:** Any company that has implemented unilateral or coordinated behaviours infringing competition law, where a competition authority has found such infringement in a decision.

**Joint-and-several liability:** Liability that may be apportioned either among two or more parties or to only one or a few select members of a group of Infringers upon the decision of a competition authority or a civil court.

**Leniency:** A competition law procedure that rewards companies that adopt anti-competitive conducts with Immunity or reduction of fine, if they inform a the competition authority of an infringement that it did not previously have knowledge of.

**Limitation period:** A statutory period after which a lawsuit or prosecution cannot be brought in court.

**Passing-on defence:** A competition law defence that relies on the civil law principle of unjust enrichment. During civil proceedings, a defendant may argue that the plaintiff’s claim for compensation should be totally or partially denied as it passed the alleged overcharge resulting from a competition law infringement on its own customers.

**SME (Small—and Medium-sized Enterprise):** Categories of micro, small and medium enterprises defined based on their staff headcount, and either their turnover or balance sheet total.

**Stand-alone action:** A competition law claim for damages where the alleged infringement has not previously been found by a final decision of a competition authority.

**Standard of proof:** In any legal procedure, the level of evidence that is required to establish with certainty a fact or a liability.

**Tort:** A civil wrong, other than breach of contract, for which a remedy may be obtained, usually in the form of damages; a breach of duty that the law imposes on persons who stand in a particular relation to one another.
The applicable framework regulating private enforcement of competition law infringements in Sweden is the Competition Damages Act (2016:964) (the "Competition Damages Act"). which entered into force on 27 December 2016 and implements Directive 2014/104/EU on antitrust damages actions (the "Damages Directive"). There is currently no closed or ongoing damages case under the new rules. The former rules continue to apply to damage claims relating to infringements that occurred before 27 December 2016.

It has been possible to award damage claims in relation to companies that have violated the competition rules since the entry into force of the Swedish Competition Act in 1993. Despite this possibility, private enforcement of competition law has been limited.

The low number of antitrust damages cases is most likely due to the long-standing judicial tradition in Swedish law, which is based on a general restrictive approach to tort law. It is likely that the frequency of follow-on damages claims in particular (and the likelihood of success of those claims) may increase over time following the enactment of the Competition Damages Act. Indeed, the Competition Damages Act introduces a number of clarifications and new provisions that will benefit future claimants.

1. Jurisdiction

The authority responsible for public enforcement of competition law in Sweden is the Swedish Competition Authority (the "SCA") or Konkurrensverket.

Private enforcement claims based on the Competition Damages Act can be brought by anyone that has suffered damage due to a competition law infringement. Such claims shall be made to the Swedish Patent and Market Court in Stockholm which, since September 2016 has jurisdiction over competition damages actions as well as competition cases brought by the SCA. A new Patent and Market Court of Appeal has been established as a court of second—and generally final—instance in such cases.

2. Relevant legislation and legal grounds

The Swedish Competition Act (2008:549) ("The Competition Act") governs in principle all aspects of Swedish competition law. The act contains two general prohibitions: the prohibition of anti-competitive agreements and the prohibition of abuse of a dominant position (Chapter 2 Sections 1 and 7). The Competition Act also includes regulations on control of concentrations as well as relevant procedural rules relating to (for example) dawn raids and other investigatory measures of the SCA.
The two general prohibitions against anti-competitive agreements and abuse of dominance correspond to Articles 101 and 102 of the Treaty of Functioning of the European Union (the “TFEU”) and are to be interpreted in line with EU law and the case-law of the courts of the European Union. Furthermore, Articles 101 and 102 TFEU are directly applicable to practices that may affect trade between EU Member States.

The Competition Act refers to the Competition Damages Act for provisions regarding damages due to competition law infringements. The Competition Damages Act provides that anyone who intentionally or negligently infringes competition law shall compensate the harm suffered. Consequently, in order for damages to be awarded under the Competition Damages Act, it must be established that (i) there has been an infringement of competition law, (ii) the infringement has committed intentionally or negligently, and (iii) there is a causal link between the infringement and the damage subject to the claim. The burden of proof in relation to these conditions lies with the claimant seeking damages.

As regards the first criterion, the Competition Damages Act provides that a final infringement decision of the Swedish Competition Authority or a Swedish court shall constitute full proof before the civil courts that the infringement occurred. The finding of a breach of the provisions of the Competition Act in a final ruling may not be re-examined in a subsequent action for damages.

There is also a relaxation of the burden of proof with regard to the third criterion. Indeed, Chapter 3 Section 4 of the Competition Damages Act establishes a rebuttable presumption that cartels cause harm. This presumption of harm does not apply to other types of competition law infringements.

3. Rationae temporis application of the Competition Damages Act

In accordance with the principle of non-retroactivity of the law established in the Swedish Constitution (Instrument of Government), the new substantial provisions of the Competition Damages Act, including but not limited to rules on limitation periods and presumptions relating to e.g. harm of cartels and passing on of costs, are applicable only to actions for damages resulting from infringements of competition rules (i.e. the facts causing liability) arising after the entry into force of the Competition Damages Act on 27 December 2016.

The transitional provisions of the Competition Damages Act explicitly establish that the following procedural rules of the Competition Damages Act shall apply to all actions brought after 25 December 2014:

- **Stay of proceedings** under Chapter 5 § 3 of the Competition Damages Act, according to which the Court may declare a case suspended if two or more parties have initiated a dispute settlement in good in relation to a claim covered by the case. The case before the Court shall be resumed no later than two years from the decision to suspend the proceedings.

- **The limitations to the possibility of general disclosure injunction** in accordance with the Swedish Code of Judicial Procedure (1942:740) that are included in chapter 5 §§ 4—7 of the Competition Damages Act (see also section 7 below).
Limitations to invoking certain written evidence under Chapter 5 § 8 of the Competition Damages Act, according to which certain documents that have been provided to the SCA as part of leniency programmes or settlement proceedings are cannot be used as evidence in a follow-on damages action.

The principle of res judicata contained in Chapter 5 § 9 of the Competition Damages Act, establishing that if a violation of competition law has been established through a final decision under the Competition Act, the question of infringement may not be re-examined in a case for damages under the Competition Damages Act.

4. What types of anti-competitive conduct are damages actions available for?

The Competition Damages Act is applicable for damages claims arising from an “infringement of competition law” which are defined to include:

i. Article 101 and Article 102 TFEU;

ii. Sections 1 and 7 in Chapter 2 of the Competition Act (the equivalent to Article 101 and 102 TFEU under Swedish law); and

iii. Equivalent national competition law of an EU Member State in accordance with Article 3(1) of Regulation No 1/2003 on the implementation of the rules on competition laid down in Articles 101 and 102 TFEU.

5. What forms of relief may a private claimant seek?

According to Chapter 3 Section 1 of the Competition Damages Act, the forms of relief available include compensation for actual loss (financial loss or loss of, or damage to, property) and loss of profit (including loss of interest).

The purpose is to restore the claimant’s financial situation in which it would have been if the infringement never occurred i.e. the hypothetical financial situation absent the infringement. Punitive or exemplary damages are not available.

In addition, successful damages claimants are awarded interests. Interest accrues from the day the harm occurred to the day compensation payment is effectuated. The interest rate is 2% above the reference rate of the Swedish Central Bank from the time the damage was caused until legal proceedings to claim compensation were initiated. Thereafter, the interest rate is 8% above the reference rate.

6. Passing-on defence

Passing-on defence is available under Chapter 3 Section 2 of the Competition Damages Act. The right to compensation for actual loss can be reduced by an amount equivalent to any overcharge the injured party has passed on to its own buyers or any undercharge the injured party has passed on to its own suppliers. The same applies in the case of undercut prices passed on by the injured party to its suppliers. The burden of proof lies with the defendant.
Corresponding to Article 14 of the Damages Directive, the Competition Damages Act also provides for a rebuttable presumption that indirect customers have suffered some level of overcharge harm, to be estimated by the court. The Swedish legislator has also chosen to introduce a corresponding passing on presumption in relation to indirect suppliers.

7. **Pre-Trial discovery and Disclosure, treatment of confidential information**

Under the general principles of the Swedish Code of Judicial Procedure (1942:740), anyone in possession of written documents (interpreted widely) that can reasonably be expected to be of evidentiary value in a civil case can be obliged by the court to disclose such evidence to the court. Such disclosure may be ordered by injunction against an opposing party as well as a third party.

The possibility of making use of this general disclosure injunction for an antitrust damages claim is subject to two main exceptions provided for in the Competition Damages Act.

First, a party can only direct such injunctions for the disclosure of materials held by the SCA when a third party cannot provide the same information conveniently. Neither is such disclosure allowed when it is reasonable to assume that such disclosure would seriously hamper the SCA’s ability to perform its duties.

Second, documents that have been provided to the SCA as part of leniency programmes or settlement proceedings, information produced by a natural or legal person specifically for the handling of a case by the SCA and information produced by the SCA and provided to the parties during the processing of a case are exempted from disclosure. There are also limitations imposed as to the use of such documents as evidence in damages proceedings. Furthermore, copies of other documents than those already mentioned and which someone has obtained only through access to the SCA’s case file may be relied on as evidence only by that person or someone who has taken over his/her rights.

In addition, the general disclosure injunction can never be used for disclosure of information subject to legal privilege. There are also other exceptions governing personal integrity, trade secrets and public interests.

8. **Limitation periods**

Different limitation periods apply for damages that occurred prior to the entry into force of the New Competition Damages Act (27 December 2016) and damages that occurred post that date.

Damage that occurred prior to the entry into force of the new Competition Damages Act

According to the previous rules, the right to damages caused by an intentional or negligent infringement of any of the prohibitions contained in Chapter 2, Article 1 or 7 of the Swedish Competition Act, or in Article 101 and 102 TFEU shall lapse if no legal action is brought within ten years from the date on which the damage occurred.
For damage that has occurred before 1 August 2005, the earlier statute of limitation of the Competition Act applies, according to which the right to damages shall lapse if no legal action is brought within five years from the date on which the damage occurred.

Damages that have occurred after the entry into force of the Competition Damages Act

Under the Competition Damages Act, claimants can initiate damages claims within five years from the time the infringement has ceased and the claimant knows, or can reasonably be expected to know: (i) of the behaviour and the fact that it constitutes an infringement of competition law, (ii) of the fact that the infringement of competition law caused harm to it, and (iii) the identity of the infringer.

The limitation period is interrupted if a competition authority in the EU takes action in respect of the infringement to which the claim relates. A new deadline runs from the day when there is a final infringement decision or when the authority terminates its procedure in some other way. In line with the Damages Directive, there are important rules about breach of the statute of limitation, e.g. in relation to settlement proceedings.

9. **Appeal**

Actions under the Competition Damages Act must be brought before the Patent and Market Court (which replaced the Stockholm District Court as the court of first instance in competition law cases as of 1 September 2016). A Patent and Market Court judgment may be appealed before the Patent and Market Court of Appeal.

As a general rule, the judgments and decisions of the Patent and Market Court of Appeal relating to competition damages cannot be further appealed. However, the Patent and Market Court of Appeal can allow for a ruling to be appealed to the Supreme Court if it is important for the application of the law that the appeal is examined by the Supreme Court.

10. **Class actions and collective representation**

It is possible to bring class action claims for antitrust damages claims. Such actions are regulated by the Swedish Group Proceedings Act (2002:599). The Group Proceedings Act contains specific procedural rules on group/class actions and is applicable to civil claims in general.

There are three ways in which group actions can be instituted under Swedish law: (i) class actions brought by an individual member of a group who is a natural person or a legal entity (private class actions), (ii) by an association of consumers or wage-earners (organisation class actions), and (iii) by a designated public authority (public class actions). The Group Proceedings Act does not specify any minimum number of claimants required for a group action to be brought. However, the court may accept a class action only if:

- the claims of the members of the group are based on circumstances that are common or of a similar nature;
the class action is not deemed unmanageable due to substantial differences in the legal basis of the claims of different members of the group;

the majority of the claims to which the action relates cannot be equally well pursued by private actions brought by individual members of the group;

the group, taking into consideration its size and ambit, is otherwise appropriately defined; and

the claimant, bringing the action on behalf of the group, is deemed an appropriate representative, taking into consideration the claimant’s interest in the substantive matter, the claimant’s financial capacity to bring a class action and other relevant circumstances.

Class actions are initiated on an opt-in basis through personal notice given to the court by each group member. Each member of the group must give notice to the court in writing within the period of time determined by the court that he or she wishes to be included in the group action. In the absence of such notice, the member is deemed to have withdrawn from the group. New group members can be allowed also in later stage of the proceedings, provided that this does not cause any significant delay of the case or other substantial inconvenience for the defendant.

Class actions are rare in Sweden, and there has not been any class action in relation to competition damages claims. It should also be mentioned that the general rule under the Code of Conduct of the Swedish Bar Association is that contingency fees are not allowed. However, contingency fees can be allowed in class actions and other cases where access to justice may be denied if contingency fees are not allowed.

11. Key Issues

Although the provisions on damages for infringements of competition rules have been in force for more than 20 years, only a limited number of competition damages cases have been tried by Swedish courts, none of which under the Competition Damages Act that entered into force on 27 December 2016.

Against the above background, it is too early to identify key issues in the application of the Competition Damages Act.

In relation to existing judgments, a key issue identified is the challenge for the claimants to fulfil its burden of proof in relation to the existence of an infringement causing ground for damages. The new Competition Damages Act brings about important rules which will probably open up for further follow-on competition damage litigations in Sweden.
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